## MAJLIS BANDARAYA PETALING JAYA v. DIGITAL VIVA SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
SURAYA OTHMAN JCA
YEOH WEE SIAM JCA
[CIVIL APPEAL NO: B-02(NCVC)(W)-2185-11-2016]
3 JANUARY 2020

***CIVIL PROCEDURE:*** *Third party proceedings – Indemnity – Third party proceeding to seek indemnity in event defendant found liable – Whether treated same way as action between plaintiff and defendant – Whether third party proceeding constituted separate action between defendant and third party within main action – Order by court for third party to pay judgment sum and costs directly to plaintiff – Whether tantamount to entering judgment for plaintiff against third party – Whether judge misappreciated nature of third party proceedings – Rules of Court 2012, O. 16 r. 3*

***CIVIL PROCEDURE:*** *Res judicata – Applicability – Whether decision in earlier suit binds present suit – Whether liability arose from judgment in earlier suit – Whether earlier judgment must 'necessarily and with precision' determine point in issue – Whether res judicata applicable*

The second respondent ('defendant') owned and operated recycling boxes using solar power known as 3R box. Under a contract ('licensing contract'), the defendant agreed to grant a license to the first respondent ('plaintiff') exclusive rights to utilise the advertising panels of its 500 recycling 3R boxes in Petaling Jaya in exchange for monetary consideration. The licensing contract stated that the defendant had obtained the approval from the appellant ('MBPJ') to install and maintain the 3R boxes for five years. The defendant installed 200 3R boxes but was unable to install the balance 300 3R boxes as the defendant could not obtain MBPJ's approval to do so. The plaintiff then filed a suit against the defendant for breach of the licensing contract ('2015 suit'). The defendant filed its defence which acknowledged the existence of the contract but contended that its failure to install the remaining 300 3R boxes was due to MBPJ's breach in another earlier contract with them. The defendant thus sought and obtained leave from the High Court to file a third party notice against MBPJ seeking full contribution or indemnity for the breach of contract between the plaintiff and the defendant. In its defence, MBPJ contended that it was not a party or privy to the licensing contract between the plaintiff and the defendant. Further, MBPJ alleged that the defendant had filed a civil suit against MBPJ ('2013 suit') and in that suit, the High Court Judge ('HCJ') found MBPJ liable, a decision which was affirmed by the Court of Appeal. Consequently, MBPJ had made full payment on the judgment sum to the defendant and as such, the matter was settled and had no relevance to the 2015 suit. After a full trial, the High Court in the 2015 suit found the defendant liable against the plaintiff

and awarded damages and costs. The High Court also ordered MBPJ, as the third party, to indemnify or contribute fully on the plaintiff's claim. Dissatisfied, MBPJ appealed on the ground that the HCJ had erred in law and in fact in ordering MBPJ to make direct payment of damages and costs to the plaintiff. The plaintiff and the defendant submitted that (i) though there was no express provision on indemnity in the licensing contract, it could be implied from the circumstances of the case; (ii) MBPJ had caused the breach of the licensing contract based on the principle of *res judicata*; and (iii) the losses suffered by the plaintiff was foreseeable by MBPJ within the meaning of s. 74(1) of the Contracts Act 1950.

**Held (allowing appeal with costs)**
**Per Suraya Othman JCA delivering the judgment of the court:**

**(1)** Based on O. 16 r. 3 of the Rules of Court 2012 ('ROC'), the whole concept of a third party proceeding is that it is an independent proceeding between a defendant as a plaintiff and a third party as a defendant. The defendant takes a third party proceeding against the third party to seek contribution or indemnity in the event the defendant was found liable and it was not intended to be treated in the same way as in an action between a plaintiff and a defendant. The effect is that, a third party proceeding constitute a separate action between a defendant and a third party within the main action. (para 29)

**(2)** The HCJ, having found the defendant liable on the plaintiff's claim, and the third party liable to indemnify the defendant, went further to order the third party MBPJ to pay the judgment sum and costs directly to the plaintiff. This tantamount to entering judgment for the plaintiff against the third party which was contrary to O. 16 r. 7 of the ROC. Procedurally, the HCJ was correct in entering judgment for the defendant against the third party. However, in ordering the third party to pay the judgment sum and costs directly to the plaintiff, the HCJ had unwittingly entered or gave judgment for the plaintiff against the third party and had thus completely misappreciated the nature of a third party proceeding. (paras 31, 33 & 34)

**(3)** There was clearly no nexus between the two claims in the two suits: the 2015 suit and the 2013 suit. The 2013 suit was between the defendant as the plaintiff and the third party as the defendant premised on a letter of award of contract dated 13 April 2012, whilst the 2015 suit was a licensing contract between the plaintiff and defendant. Therefore, the 2013 suit was not relevant to the present 2015 suit. Further, MBPJ had made full payment on the judgment sum awarded to the defendant in the 2013 suit and as such, the matter was considered settled and had no relevance to the present 2015 suit. Further, there was no indemnity clause provided in the licensing contract to allow the defendant to be indemnified by MBPJ in the event it was found liable to the plaintiff. (paras 35 & 37)

**(4)** To constitute a matter *res judicata*, the earlier judgment must 'necessarily and with precision' determine the point in issue. In the case of *Chea Wee Seng v. Fazal Mohamed* it was stated that to constitute *res judicata*, the conditions to be fulfilled, amongst others, were: (i) the former suit must have been a suit between the same parties or between parties under whom they or any of them claim; (ii) the parties must have litigated under the same title in the former suit; and (iii) the matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit. The conditions were not fulfilled in the present case and therefore, the judgment in the 2013 suit did not necessarily and with precision determine the point in issue in the 2015 suit. Hence, there was no merit in the plea of *res judicata* by the plaintiff and the defendant. It followed that the issue on s. 74 of the Contracts Act 1950 was irrelevant. (paras 42-45)

**Case(s) referred to:**

*Boustead Naval Shipyard Sdn Bhd v. Dynaforce Corporation Sdn Bhd [2014] 5 CLJ 533 CA* ***(refd)***

*Chua Wee Seng v. Fazal Mohamed [1970] 1 LNS 19 HC* ***(refd)***

*Edison & Swan United Electric Light Co v Holland (1889) 41 Ch 28* ***(refd)***

*Kepong Prospecting Ltd & Ors v. Schmidt [1967] 1 LNS 67 PC* ***(refd)***

*Kok Hoong v. Leong Cheong Kweng Mines Ltd [1963] 1 LNS 61 PC* ***(refd)***

*Mat Abu Man v. Medical Superintendent, General Hospital Taiping & Ors [1989] 1 CLJ 137; [1989] 1 CLJ (Rep) 98 SC* ***(refd)***

*Residence Hotels and Resorts Sdn Bhd v. Seri Pacific Corporation Sdn Bhd [2016] MLJU 45* ***(refd)***

*United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor [1999] 2 CLJ 151 FC* ***(refd)***

**Legislation referred to:**

Contracts Act 1950, ss. 54, 74(1)

Rules of Court 2012, O. 16 rr. 3(3), 7

*For the appellant - Gopal Sri Ram, Lateefa Koya & David Yii; M/s Daim & Gamany*
*For the 1st respondent - Mahathir Abdullah; M/s Mahathir*
*For the 2nd respondent - Yee Fei Churn, Davis Ee & Tung Kai Mun; M/s Davis & Low*

*[Editor's note: Appeal from High Court, Shah Alam; Civil Suit No: 22NCVC-110-03-2015 (overruled).]*

*Reported by S Barathi*

## JUDGMENT

**Suraya Othman JCA:**

### Introduction

**[1]** Digital Viva Sdn Bhd, the first respondent/plaintiff filed a writ action, civil suit No. 22NCVC-110-03-2015 ("2015 suit") against Tyewei Marketing Sdn Bhd, the second respondent/defendant in the High Court seeking damages and costs for breach of a licensing contract dated 15 August 2012. The second respondent/defendant took a third party proceedings

against Majlis Bandaraya Petaling Jaya (MBPJ), the appellant/third party to seek indemnity for the breach of contract between the first respondent and the second respondent.

**[2]** The High Court on 3 November 2016 allowed the first respondent's/plaintiff's claim against the second respondent/defendant for damages in the sum of RM15,843,600 and costs of RM25,000 and ordered the appellant/third party to fully indemnify the second respondent/defendant for the breach of the licensing contract between the second respondent/defendant and first respondent/plaintiff on the basis that the breach by the second respondent/defendant in the licensing contract in the 2015 suit was as a direct result of the appellant/third party's breach of the letter of award contract dated 13 April 2012 between the appellant/third party and the second respondent/defendant in another earlier civil suit No. 21NCVC-48-07-2013) ("2013 suit"). In the 2013 suit the appellant/third party was the defendant and the second respondent/defendant was the plaintiff. The High Court in the 2013 suit found the appellant/third party liable to the second respondent and the Court of Appeal on appeal by the appellant/third party affirmed the decision of the High Court.

**[3]** The High Court in the 2015 suit (present suit) in finding the appellant/third party liable to indemnify the second respondent/defendant further ordered that the appellant/third party to pay the damages in the sum of RM15,843,600 and costs of RM25,000 directly to the solicitors for the first respondent/plaintiff.

**[4]** The appellant/third party, dissatisfied with the High Court's decision appealed to us. We heard the appeal on 5 March 2018 and allowed the appellant's appeal with costs of RM10,000 to the appellant. We now give our reasons for our decision and for ease of reference, in this judgment, parties will be referred to as they were in the High Court: the appellant/third party as MBPJ, the first respondent Digital Viva as the plaintiff and the second respondent Tyewei Marketing as the defendant.

**Background Facts**

**[5]** The defendant owns and operates recycling boxes using solar power known as 3R Box. Under a contract dated 15 August 2012 (licensing contract), the defendant agreed to grant a license to the plaintiff exclusive rights to utilise the advertising panels of its 500 recycling 3R Boxes in Petaling Jaya in exchange for a monetary consideration.

**[6]** The licensing contract states that the defendant had obtained the approval from MBPJ to install and maintain the 3R Boxes for five years. The defendant installed 200 3R Boxes but was unable to install the balance 300 3R Boxes as the defendant could not obtain MBPJ's approval to do so. The plaintiff then filed this present suit, civil suit No. 22NCVC-110-03-2015 ("2015 suit") against the defendant for breach of the licensing contract and

claimed the sum of RM51,579,200 which represented the alleged loss suffered by the plaintiff arising from the said breach. Alternatively, the plaintiff sought general damages, to be assessed by the High Court.

**[7]** On 5 May 2015, the defendant filed its defence which acknowledged the existence of the said contract but contended that its failure to install the remaining 300 3R Boxes was due to MBPJ's breach in another earlier contract with them dated 13 April 2012. This contract was a contract between the defendant (as plaintiff) and MBPJ (as defendant) premised on a letter of award dated 13 April 2012.

**[8]** The defendant then sought and was granted leave from the High Court to file a third party notice against MBPJ seeking full contribution or indemnity on the plaintiff's claim.

**[9]** MBPJ as a third party filed its defence and contended that MBPJ is not a party or privy to the licensing contract between the plaintiff and the defendant. MBPJ alleged that the defendant, prior to this, had filed a civil suit against MBPJ premised on the 13 April 2012 letter of award contract (2013 suit) and the High Court in the 2013 suit had found MBPJ liable and on appeal, the decision of the High Court was affirmed by the Court of Appeal. MBPJ submitted that it had made full payment on the judgment sum awarded to the defendant in the 2013 suit and as such the matter is settled and has no relevance to the present 2015 suit.

**[10]** On 3 November 2016, the High Court in the present suit, after a full trial, found the defendant liable as against the plaintiff and awarded damages in the sum of RM15,843,600 and costs of RM25,000 to the plaintiff. The High Court ordered MBPJ as third party to indemnify or contribute fully on the plaintiff's claim. MBPJ was also ordered to pay the judgment sum and costs directly to the solicitors for the plaintiff.

**[11]** Dissatisfied with the decision of the High Court, MBPJ filed this appeal ("appeal 2185") on 13 November 2016.

**Findings Of The High Court**

**[12]** The High Court found that:

i) the defendant is liable for the breach of the licensing contract dated 15 August 2012 between the plaintiff and the defendant;

ii) MBPJ, as a third party, is liable to indemnify the defendant on the plaintiff's claim and any defence raised by MBPJ cannot stand since its liability to the defendant was pursuant to, or arose from, the judgment in another earlier civil suit No. 21NCVC-48-07-2013 (2013 suit) which judgment was affirmed by the Court of Appeal. In other words, suit 2013's decision where the defendant (as plaintiff) sued MBPJ (as

defendant) for breach of the letter of award contract dated 13 April 2012 where the High Court found MBPJ liable for the breach of the contract, binds MBPJ;

iii) MBPJ as a third party was 100% liable to indemnify the defendant for the damages and costs awarded against the defendant pursuant to s. 54 of the Contracts Act 1950; and

iv) MBPJ was ordered to pay damages in the sum of RM15,843,600 and costs of RM25,000 directly to the solicitors for the plaintiff.

In summary, the High Court found MBPJ liable to indemnify in full the losses suffered by the plaintiff due to the breach by the defendant of the licensing contract dated 15 August 2012 premised on the fact that MBPJ had been found liable to the defendant in another earlier suit (2013 suit) for the breach of the letter of award contract dated 13 April 2012 which decision was affirmed by the Court of Appeal.

**Submission Of Counsel**

*MBPJ's Submission*

**[13]** Learned counsel for the appellant/third party MBPJ submitted that the learned judge misdirected himself in law and in fact in holding that MBPJ as a third party was liable to indemnify the defendant for the claim brought by the plaintiff against the defendant. In allowing the defendant's claim for indemnity against MBPJ for a claim brought by the plaintiff against the defendant, and in making an order that MBPJ pay damages and costs directly to the plaintiff's solicitors, the learned judge has misappreciated the true nature of a third party proceedings under O. 16 r. 3(3) of the Rules of Court 2012. This is especially so when there was no express provision in the licensing contract that MBPJ will indemnify the defendant.

**[14]** Further, the learned judge erred in law in holding that MBPJ has no defence to the defendant's claim for indemnity as its liability towards the defendant had been established through the decision in the 2013 suit which decision was affirmed by the Court of Appeal in Appeal No. B-01(NCVC)(W)-321-98-2014 and, as such, is binding on the present case (2015 suit). This proposition, learned counsel argued, is incorrect, as the 2013 suit has no relevance to the present 2015 suit since it arose from MBPJ's breaches in a contract dated 13 April 2012 entered into between MBPJ and the defendant and which had nothing to do with the plaintiff. Further, MBPJ is not a party nor privy to the licensing contract.

**[15]** The learned judge found that based on s. 54 of the Contracts Act 1950, MBPJ is fully liable to indemnify the defendant for the losses and costs suffered by the plaintiff due to the defendant's breach. Learned counsel submitted that s. 54 has no application whatsoever to the facts of the present appeal.

*Plaintiff And Defendant's Submission*

**[16]** On the other hand, learned counsel for the plaintiff and defendant, submitted that though there was no express provision on indemnity in the licensing contract, it can be implied from the circumstances of the case.

**[17]** Learned counsel contended that MBPJ's breach of its letter of award contract dated 13 April 2012 with the defendant, as identified by the High Court in the 2013 suit, had caused the defendant to breach the licensing contract dated 15 August 2012 with the plaintiff in the present 2015 suit. As such, learned counsel argued, that MBPJ cannot deny that it had caused the breach of the licensing contract between the plaintiff and the defendant based on the principle of *res judicata* and the principle enunciated in the case of *Residence Hotels and Resorts Sdn Bhd v. Seri Pacific Corporation Sdn Bhd* [2016] MLJU 45.

**[18]** Further, learned counsel submitted, the only remaining issue then left to be determined by the learned judge therefore, was, whether the loss suffered by the plaintiff was foreseeable by MBPJ within the meaning of s. 74(1) of the Contracts Act 1950, as a likely outcome of MBPJ's breach of its letter of award contract with the defendant, which in turn caused the defendant to breach the licensing contract with the plaintiff. In this, counsel argued that the loss suffered by the plaintiff is of a nature within the contemplation of MBPJ at the time of the issuance of the letter of award by MBPJ to the defendant as being a loss which would probably arise from a breach by MBPJ of the terms of the letter of award, particularly as MBPJ was aware that the defendant would be selling the advertising space to third parties.

**Our Decision**

**[19]** A perusal of MBPJ's memorandum of appeal (MOA) reveals that the main grouse or ground of appeal relates almost entirely to the finding of the learned judge that MBPJ was liable to indemnify the defendant in respect of the defendant's liability to the plaintiff.

**[20]** In this, we agree with the plaintiff that MBPJ is not questioning the finding of the learned judge that the defendant is liable to the plaintiff for breach of the licensing contract, nor is MBPJ questioning the quantification of the damages awarded to the plaintiff by the learned judge.

**[21]** What the memorandum of appeal reveals is that, as against the plaintiff, MBPJ has only one ground of appeal, that is, at ground number 4 of the MOA, where MBPJ contended that the learned judge had erred in law and in fact in ordering MBPJ to make direct payment of damages and costs to the plaintiff. The rest of the grounds of appeal are grounds against the defendant based on the finding by the learned judge, which MBPJ contended

is erroneous, that MBPJ had caused the defendant to breach its licensing contract with the plaintiff and having done so, MBPJ has to indemnify the defendant by paying 100% or in full the damages and costs that was imposed on the defendant directly to the plaintiff.

**[22]** It must be noted that since the defendant has withdrawn its appeal against the decision of the High Court, it has thus accepted the court's decision as to liability and the quantification of quantum on damages as correct; that it is liable to the plaintiff for its breach of the licensing contract and that the quantification by the learned judge on the losses suffered by the plaintiff in the sum of RM15,843,600 is correct. The defendant's only stand is to maintain that the learned judge was correct in finding that the breach by them of the licensing contract with the plaintiff was due to MBPJ's breach of the letter of award contract with them and because of this, MBPJ was liable to indemnify them on the plaintiff's claim.

**[23]** As to the issue of the application of s. 54 of the Contracts Act 1950 (Act 136), both counsel for the plaintiff and defendant admitted that they did not plead this section and there may have been a typographical error on the part of the learned judge, as the proper section applicable is s. 74 of the same on the foreseeability test of losses within the contemplation of parties as a result from a breach of contract and not s. 54.

**[24]** There are three issues which MBPJ had raised and they are:

(i) Whether there was a misappreciation of the true nature of third party proceedings;

(ii) Whether there was a privity of contract between the plaintiff and MBPJ; and

(iii) Whether the decision in the 2013 suit binds the present 2015 suit. Whether *res judicata* applies in this case.

**[25]** As stated earlier, the High Court found that the defendant is liable for the breach of the licensing contract dated 15 August 2012 between the plaintiff and the defendant and MBPJ, as a third party, is liable to indemnify the defendant on the plaintiff's claim. The High Court also found that MBPJ's liability towards the defendant was established through the judgment in the 2013 suit.

**[26]** Learned counsel for MBPJ submitted that the learned judge misdirected himself in law and in fact in holding that MBPJ as a third party was liable to indemnify the defendant for the claim brought by the plaintiff against the defendant. In allowing the defendant's claim for indemnity against MBPJ for a claim brought by the plaintiff against the defendant, and in making an order that MBPJ pay damages and costs directly to the plaintiff's solicitors, the learned judge has misappreciated the true nature of a third

party proceedings under O. 16 r. 3(3) of the Rules of Court 2012. This is especially so when there was no express provision found in the licensing contract that MBPJ will indemnify the defendant in the event the defendant is found to be liable to the plaintiff. Further, MBPJ argued that neither the plaintiff nor the defendant could show that MBPJ was a party or privy to the licensing contract and how the 2013 suit binds the present 2015 suit.

**[27]** Counsel for the plaintiff and defendant submitted that the defendant breached the licensing contract with the plaintiff as a direct result of MBPJ's breach of the letter of award contract dated 13 April 2013 with the defendant and as such MBPJ, who the defendant had brought in as a third party, is liable to indemnify the defendant on the plaintiff's claim. Further, MBPJ's liability towards the defendant had been established through the earlier decision in the 2013 suit where MBPJ was found liable to the defendant. This decision on appeal was affirmed by the Court of Appeal in Appeal No. B-01(NCVC)(W)-321-98-2014 and, as such, is binding on the present case (2015 suit).

*Third Party Proceedings*

**[28]** On the issue of third party proceedings, O. 16 of the Rules of Court 2012 [P.U. (A) 205/2012] provides the manner in which one is to go about applying it. Order 16 r. 3 specifically states:

> **Issue, service of and entry of appearance in third party notice (O. 16, r. 3)**
>
> 3. (1) The order granting leave to issue a third party notice may contain directions as to the period within which the notice is to be issued.
>
> (2) There shall be served with every third party notice a copy of the writ or originating summons by which the action was begun and of the pleadings, if any, served in the action.
>
> (3) Subject to paragraphs (1) and (2), Order 6, rule 6(3), Order 10 (except rule 1(4)), Order 11, Order 12 and Order 70, rule 3 shall apply in relation to a third party notice and to the proceedings begun thereby as if:
>
> **(a) the third party notice is a writ and the proceedings begun thereby an action; and**
>
> **(b) the defendant issuing the third party notice is a plaintiff and the person against whom it is issued a defendant in that action.**
>
> (emphasis added)

**[29]** As can be seen from a perusal of O. 16 r. 3 above, the whole concept of a third party proceedings is that it is an independent proceeding between a defendant as a plaintiff and a third party as a defendant. The defendant takes a third party proceeding against the third party to seek for contribution or indemnity in the event the defendant is found liable and it was not intended to be treated in the same way as an action between a plaintiff and a defendant. The effect is that, a third party proceedings constitute a separate action

between a defendant and a third party within the main action. This proposition can be found in the case of *Mat Abu Man v. Medical Superintendent, General Hospital Taiping* [1989] 1 CLJ 137; [1989] 1 CLJ (Rep) 98; [1989] 1 MLJ 226, 228, where the Supreme Court held as follows:

> **We also do not think that a proceeding under O. 16 of the Rules of the High Court 1980 is intended to be treated in the same way as an action between a plaintiff and a defendant.**
>
> **Third-party proceedings for contribution should be regarded as independent of and separate from proceedings by a plaintiff against a defendant.** When a defendant is made liable to the plaintiff, he then has his right open against a third party to establish that he possesses a right to contribution or indemnity from the third party. Time should begin to run from the date the defendant is held liable. (emphasis added)

**[30]** The decision in *Mat Abu bin Man* was adopted by the Federal Court in *United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor* [1999] 2 CLJ 151; [1999] 1 MLJ 657 at 662, where it was held as follows:

> With respect, we do not think this is correct because third party proceedings are independent proceedings between a defendant as plaintiff and a third party as defendant (*Mat Abu bin Man v. Medical Superintendent General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226 (SC)).

**[31]** In our instant appeal, the learned judge, having found the defendant liable on the plaintiff's claim, and the third party liable to indemnify the defendant, went further to order the third party MBPJ to pay the judgment sum and costs directly to the plaintiff's solicitors. In doing so, we are in agreement with learned counsel for MBPJ that it tantamount to entering judgment for the plaintiff against the third party which is contrary to O. 16 r. 7 of the Rules of Court 2012 which reads as follows:

> **Judgment between defendant and third party (O. 16, r. 7)**
>
> 7. (1) Where in any action a defendant has served a third party notice, the Court may at or after the trial of the action or, if the action is decided otherwise than by trial, on an application, order **such judgment as the nature of the case may require to be entered for the defendant against the third party or for the third party against the defendant.**
>
> (2) Where in an action judgment is given against a defendant and judgment is given for the defendant against a third party, execution shall not be issued against the third party without the leave of the Court until the judgment against the defendant has been satisfied. (emphasis added)

**[32]** A case in point is the case of *Edison & Swan United Electric Light Co v. Holland* (1889) 41 Ch. 28, where it was held as follows:

> A curious point has been raised after judgment in this case. The Plaintiffs now ask the Court to treat the third parties in this action as if they were defendants to the action, not only to the extent of making them pay costs, but also to the extent of granting relief against them by way of injunction. **That, however, would, I think, be wrong, because the third parties are not in reality defendants.** (emphasis added)

**[33]** Thus based on O. 16 r. 7, judgment may be entered for the defendant against the third party or for the third party against the defendant. The learned judge was correct procedurally in entering judgment for the defendant against the third party. However, in ordering the third party to pay the judgment sum and costs directly to the plaintiff, the learned judge had unwittingly entered or gave judgment for the plaintiff against the third party, and as was held in the case of *Edison & Swan* (*supra*), had treated "the third parties in this action as if they were defendants to the action, not only to the extent of making them pay costs, but also to the extent of granting relief against them" and that would "be wrong, because the third parties are not in reality defendants."

**[34]** Further, since MBPJ is not a party to the present action (2015 suit) between the plaintiff and the defendant (MBPJ is also not a co-defendant) but only a party *vis-a-vis* the defendant and MBPJ in the 2013 suit, we are of the view that the learned judge in ordering payments of the judgment sum and costs by MBPJ direct to the plaintiff had completely misappreciated the true nature of a third party proceedings.

*Privity Of Contract*

*Whether There Was A Privity Of Contract Between The Plaintiff And MBPJ*

**[35]** On the issue of whether there was privity of contract between the plaintiff and MBPJ, we agreed with counsel for MBPJ that there clearly is no nexus between the two claims in the two suits: the 2015 suit and the 2013 suit. Suit 2013 was between the defendant as plaintiff and the third party as defendant premised on a letter of award contract dated 13 April 2012 where the High Court found the defendant liable to the plaintiff for breach of the contract while suit 2015 (present suit) was a licensing contract between the plaintiff and defendant dated 15 August 2012. The 2013 suit is thus not relevant to the present 2015 suit.

**[36]** Counsel for MBPJ submitted that MBPJ cannot be subjected to liabilities arising under the licensing contract dated 15 August 2012 (present suit) to which it is not a party. The defendant had breached its obligation under the said contract and had admitted doing so and the defendant cannot now rely on the breaches of MBPJ in a different contract to deny its liability. This goes against the doctrine of privity of contract. In support, MBPJ relied on the Privy Council case of *Kepong Prospecting Ltd & Ors v. Schmidt* [1967] 1 LNS 67; [1968] 1 MLJ 170 and the Court of Appeal case of *Boustead Naval Shipyard Sdn Bhd v. Dynaforce Corporation Sdn Bhd* [2014] 5 CLJ 533; [2015] 1 MLJ 284 which held that the English doctrine of privity of contract applies to our law of contract and that only a person who is a party to a contract can sue on it.

**[37]** We are in agreement with this proposition since counsel for the plaintiff and the defendant had failed to show the relevance of the 2013 suit to the present 2015 suit. This is especially so when MBPJ had made full payment on the judgment sum awarded to the defendant in the 2013 suit and as such the matter is considered settled and has no relevance to the present 2015 suit. Further, there is no indemnity clause provided in the licensing contract (present 2015 suit) to allow the defendant to be indemnified by MBPJ in the event it is found liable to the plaintiff. Thus, we are of the view that there is no nexus, no privity between the plaintiff and MBPJ and whatever breaches that MBPJ had committed in the 2013 suit between them and the defendant, MBPJ has been found to be liable and judgment sum has been paid in full and as such the 2013 suit, as stated earlier, has no relevance to the present 2015 suit.

*Whether The Decision In The 2013 Suit Binds The Present 2015 Suit*

*Whether Res Judicata Applies In This Case*

**[38]** The learned judge found that MBPJ, as a third party is liable to indemnify the defendant on the plaintiff's claim and any defence raised by MBPJ cannot stand since its liability to the defendant was pursuant to, or arose from, the judgment in another earlier civil suit, the 2013 suit which judgment, on appeal, was affirmed by the Court of Appeal. In other words, suit 2013's decision where the defendant (as plaintiff) sued MBPJ (as defendant) for breach of the letter of award contract dated 13 April 2012 where the High Court found MBPJ liable to the plaintiff for breach of the said contract, binds MBPJ in the present 2015 suit.

**[39]** Learned counsel for MBPJ submitted that the learned judge in holding that any defence raised by MBPJ in the present suit, cannot stand, pursuant to the judgment in the 2013 suit, has in effect invoked the issue of *res judicata*. Learned counsel submitted that *res judicata* does not apply in the present 2015 suit as the judgment in the 2013 suit had not necessarily and with precision determine the point in issue in the present 2015 suit. This is so since the conditions to constitute a matter *res judicata* are not fulfilled.

**[40]** Learned counsel for the plaintiff and defendant on the other hand, argued that MBPJ cannot deny that it had caused the breach of the licensing agreement by the defendant, based on the principle of *res judicata* and that the only remaining issue to be determined by the learned judge was whether the loss suffered by the plaintiff was foreseeable by MBPJ as a likely outcome of MBPJ's breach of its letter of award contract with the defendant, which in turn had caused the defendant to breach the licensing contract, within the meaning of s. 74(1) of the Contracts Act 1950.

**[41]** We have already stated earlier that the 2013 suit has no relevance to the present 2015 suit since they are two different suits involving different parties and different contracts and that there is no nexus or privity of contract between the plaintiff and MBPJ. Further, apart from the fact that MBPJ has

paid in full the judgment sum and costs awarded to the defendant in the 2013 suit resulting in the matter being settled or put to rest, the licensing contract in the 2015 suit is devoid of any express provision on indemnity to make MBPJ, as a third party, liable to indemnify the defendant in the event the defendant is found liable to the plaintiff. Be that as it may, for the sake of completeness and to satisfy the plaintiff and defendant, let us peruse the facts and circumstances in this case to see whether the conditions to constitute a matter *res judicata* are met or fulfilled.

**[42]** To constitute a matter *res judicata*, the earlier judgment must, in terms of the Privy Council's decision in *Kok Hoong v. Leong Cheong Kweng Mines Ltd* [1963] 1 LNS 61; [1964] AC 993; [1964] MLJ 49, "necessarily and with precision" determine the point in issue. So, the question here is, whether the earlier judgment in the 2013 suit had necessarily and with precision determine the point in issue in the 2015 suit?

**[43]** In *Chua Wee Seng v. Fazal Mohamed* [1970] 1 LNS 19; [1971] 1 MLJ 106, the court held that:

> To constitute a matter *res judicata* the following conditions must be fulfilled:
>
> 1. The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit.
> 2. **The former suit must have been a suit between the same parties or between parties under whom they or any of them claim.**
> 3. **The parties as aforesaid must have litigated under the same title in the former suit.**
> 4. The court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue is subsequently raised.
> 5. **The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit.**
>
> (emphasis added)

**[44]** From our perusal on the facts and circumstances of this present 2015 suit, conditions 2, 3 and 5 as enumerated in *Chua Wee Seng* (*supra*) are not fulfilled and thus we conclude that the earlier judgment in the 2013 suit did not necessarily and with precision determine the point in issue in the 2015 suit. Therefore, we are of the view that there is no merit whatsoever in the plea of *res judicata* by the plaintiff and the defendant.

**[45]** Since we found that *res judicata* is not applicable, the issue on s. 74 of the Contracts Act 1950 is irrelevant.

**Conclusion**

**[46]** For the reasons stated above, we are of the view that this is a fit and proper case for appellate intervention. We therefore unanimously allowed this appeal with costs of RM10,000 to the appellant third party. The decision of the High Court dated 3 November 2016 is hereby set aside. Deposit is refunded to the appellant.